

WILLIAM F. WINNER
Claimant

HARTFORD MANOR, INC.
Respondent

CHURCH MUTUAL INSURANCE COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge found claimant entitled to benefits for a ten percent (10%) permanent partial impairment of function to the right leg and denied benefits for an alleged back injury. The claimant requests the Appeals Board review the Award of the Special Administrative Law Judge. The issues now before the Appeals Board are:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent.
- (2) The nature and extent of disability, if any.
- (3) The date claimant's temporary total disability benefits should have terminated.
- (4) Whether claimant is entitled to vocational rehabilitation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

- (1) For the reasons expressed below, the findings of the Special Administrative Law Judge denying benefits for the alleged back injury, but awarding benefits for the right knee injury, should be affirmed. However, the award should be modified to reflect the appropriate period claimant is entitled to temporary total disability benefits. The findings and conclusions of the Special Administrative Law Judge are accurate and are hereby adopted by the Appeals Board except those that are inconsistent with the specific findings and conclusions set forth herein.

Claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on or about December 16, 1990, when he slipped and fell onto his right knee. Although claimant had previously injured his knees when playing with his children in November, claimant re-injured the right knee when he slipped and fell at work.

The Appeals Board agrees with the Special Administrative Law Judge that claimant has failed to prove it is more probably true than not that he injured his back at work when he fell or that it was later injured during an arthroscopic procedure to the injured knee. Claimant is a poor historian and gave inconsistent accounts regarding his knee injuries and back complaints. In addition, claimant clearly misstated the facts when asked about his work activities during the regular hearing. Because of these factors, very little weight can be given claimant's testimony.

The medical evidence is clear that claimant began treatment for his right knee after the alleged accident on December 16, 1990. Therefore, the Appeals Board finds the accident did, in fact, occur and did cause injury to the right knee. Because the emergency

room records and those of the claimant's initial treating physician, Michael Montgomery, M.D., do not corroborate claimant's contentions that his back was symptomatic immediately after the initial fall, the evidence fails to carry claimant's burden of proof regarding injury to the back. Likewise, the evidence fails to prove claimant's alternative theory that his back was injured during the arthroscopic procedure performed on the knee.

In addition, the Appeals Board has considered the testimony of Evert Heins, Jr., and his wife, Jane Heins, two (2) independent witnesses with absolutely no stake in the outcome of this litigation. It is clear from the Heins' testimonies that claimant performed miscellaneous farm chores for them beginning September 3, 1991 through approximately June of 1992. Although the evidence indicates most of the chores did not require strenuous manual labor, both Mr. and Mrs. Heins testified they were unaware from their personal observations and conversations with claimant that he was suffering from an injury. Based upon the above, the claim for benefits for the alleged back injury should be denied, but the claim for injury to the right knee should be allowed.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

In order to recover, the claimant must establish he has sustained a personal injury by accident arising out of and in the course of his employment. K.S.A. 44-501(a).

The terms "injury" and "accident" are not synonymous. Each must be established by the claimant. An "accident" is ". . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force." K.S.A. 44-508(d). An accident is an event which causes an injury. The injury is a change in the physical structure of the body which occurs as a result of the accident. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 317, 573 P.2d 1025 (1978).

(2) Both Dr. John J. Wertzberger and Dr. Michael Montgomery testified in this proceeding. Dr. Wertzberger first saw claimant on April 5, 1991, and prescribed anti-inflammatories and physical therapy. Dr. Wertzberger believes claimant has sustained a ten percent (10%) permanent partial impairment of function to the right lower extremity as a result of the knee injury and resulting condition of post-arthroscopy synovitis. On the other hand, Dr. Montgomery testified claimant had a five percent (5%) permanent partial impairment of function to the right lower extremity as a result of the right knee injury. Dr. Montgomery believes claimant's fall aggravated a congenital condition in the knee known as medial patellar plica. The Appeals Board finds the opinion of Dr. Wertzberger regarding impairment to the knee more accurate and, therefore, finds that claimant has experienced a ten percent (10%) permanent partial impairment of function to the right leg for which he is entitled permanent disability benefits in this proceeding.

(3) The Appeals Board agrees with the finding of the Special Administrative Law Judge that claimant's temporary total disability benefits should have ceased as of the day he began working and performing farm chores for Mr. and Mrs. Heins. However, that date is September 3, 1991 rather than September 8, 1991, as found by the Administrative Law Judge. Therefore, the respondent is entitled credit for the temporary total disability benefits paid for the period of September 3 through December 9, 1991, the last day for which temporary total was paid. As indicated by the testimony and exhibits provided by the Heins, claimant rented a house from the couple and worked in exchange for both cash and credit towards rent. From September 3, 1991 through approximately June 1992, claimant worked numerous days, sometimes for more than eight (8) hours per day. While working for the Heins, claimant received either cash or credit of \$5.00 per hour. Some of the work claimant performed as a farm hand consisted of dragging tree limbs and brush, dragging bales of hay, grinding alfalfa, setting up electrical fence, sweeping and shoveling grain and manure, hooking up anhydrous ammonia tanks, handling sacks of seed, and working in a garden. For these miscellaneous chores, claimant received or was credited for greater than \$2,000.00 for calendar year 1991. Based upon this evidence, the Appeals Board finds claimant was engaged in substantial and gainful employment while performing these farm chores. Therefore, respondent is entitled credit for the temporary total disability benefits it paid to claimant between September 3, 1991 and December 9, 1991.

(4) The evidence fails to establish claimant is in need of vocational rehabilitation benefits. Therefore, claimant's request for these benefits is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 22, 1994, should be, and hereby is, modified as follows:

An award of compensation is hereby made in accordance with the above findings in favor of the claimant, William F. Winner, and against the respondent, Hartford Manor, Inc., and its insurance carrier, Church Mutual Insurance Company, and the Workers Compensation Fund, for an accidental injury which occurred on December 16, 1990, and based upon an average weekly wage of \$242.00 for 36.57 weeks of temporary total disability compensation at the rate of \$161.34 in the sum of \$5,900.20 and 16.34 weeks at the rate of \$161.34 per week in the sum of \$2,636.30 for a ten percent (10%) partial impairment of function to the right leg making a total award of \$8,536.50, all of which is past due and owing and ordered paid in one lump sum, less payments previously made, including the temporary total paid between September 3, 1991 and December 9, 1991.

Unauthorized medical expense up to \$350.00 is ordered paid or reimbursed upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Future medical care and treatment may be obtained upon proper application to the Director of the Division of Workers Compensation.

Fees necessary to defray the expenses of administration of the workers compensation act are hereby assessed eighty percent (80%) to the respondent and twenty percent (20%) to the Kansas Workers Compensation Fund to be paid directly as follows:

William F. Morrissey	\$150.00
Special Administrative Law Judge	
Correll Reporting Service	\$319.95
Transcript of Regular Hearing	
Nora Lyon & Associates	
Transcript of Preliminary Hearing	\$175.78
Deposition of Donald F. Vander Vegt	Unknown
Deposition of John J. Wertzberger, M.D.	\$219.90
Deposition of Dona Wall	\$338.80
Continuation of Deposition of Dona Wall	\$272.00
Appino & Achten Reporting Service	
Continuation of Regular Hearing	\$259.05
Deposition of Evert Heins, Jr.	\$366.00
Deposition of Jane Heins	\$116.20
Deposition of Sheryl Burris	\$104.80
Deposition of Michael Montgomery, M.D.	\$298.20

The Kansas Workers Compensation Fund is ordered to pay or reimburse twenty percent (20%) of the compensation, medical expense, and costs associated with this proceeding.

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Emporia, KS
Matthew S. Crowley, Topeka, KS
Derek J. Shafer, Topeka, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director